

# **EXHIBIT 23**

## **CONFIDENTIAL**

In accordance with a protective order, the enclosure(s) shall be treated as confidential and shall not be shown to any person other than those persons designated in paragraph 8.2 of the paragraph order.

CONFIDENTIAL

Page 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

----- :  
CUSTODIA BANK, INC., :  
 :  
Plaintiff, :  
 : Case No.  
vs. : 1:22-cv-00125-SWS  
 :  
FEDERAL RESERVE BOARD OF :  
GOVERNORS and FEDERAL RESERVE :  
BANK OF KANSAS CITY, :  
 :  
Defendants. :  
----- :

CONFIDENTIAL DEPOSITION OF  
PETER CONTI-BROWN, PH.D.

DATE: Thursday, December 14, 2023  
TIME: 8:09 a.m.  
LOCATION: King & Spalding, LLP  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
  
REPORTED BY: Erick M. Thacker  
Reporter, Notary

Veritext Legal Solutions  
1250 Eye Street, NW, Suite 901  
Washington, D.C. 20005

Veritext Legal Solutions

215-241-1000 ~ 610-434-8588 ~ 302-571-0510 ~ 202-803-8830

CONFIDENTIAL

Page 6

1 depository institutions, which is the -- the term  
2 used in -- in and around the Monetary Control  
3 Act.

4 Q Okay. So it's your opinion, then, that  
5 all state-chartered institutions that are legally  
6 eligible -- sorry. Strike that.

7 All state-chartered depository  
8 institutions that are legally eligible are  
9 automatically entitled to unfettered access to  
10 all of the Fed's priced services?

11 A I'll leave the legal conclusions to the  
12 Court to determine. My opinions are about the  
13 intentions of the statutory framers of the  
14 Monetary Control Act and the practices of the  
15 Federal Reserve from 1980 to the present and  
16 understanding that -- that authority, that --  
17 that question.

18 I take your question to be a legal one.  
19 I don't offer an opinion on that legal  
20 conclusion.

21 Q But you -- it is your opinion, though,  
22 that Congress intended through the Monetary

CONFIDENTIAL

Page 7

1 Control Act to accomplish that result?

2 A It's my opinion that the framers of  
3 the -- of the Monetary Control Act intended to  
4 equalize access to the Federal Reserve's priced  
5 services to all depository institutions that were  
6 legally eligible for them.

7 Q And by equalized access, are you  
8 referring there to unfettered access to all of  
9 the Fed's priced services?

10 A Can you define for me what you mean by  
11 unfettered?

12 Q Unconditional. And you're referring  
13 here to initial access or ongoing access, or what  
14 do you mean by that?

15 A Both.

16 Q No, not necessarily. There are  
17 instances consistent in Fed history where  
18 determinations are made that -- that access --  
19 ongoing access to -- to some priced services can  
20 be conditioned consistent with legislation and  
21 regulation.

22 Q And what's an example of that?

CONFIDENTIAL

Page 8

1           A       So, for example, a legally eligible  
2       depository institution that has gained access to  
3       the discount window can have that access  
4       conditioned on the quality of collateral, the  
5       quality of its own balance sheet, regulatory and  
6       supervisory assessments, some of which are  
7       defined by statute, some by regulation, some by  
8       supervision.

9           Q       And -- and it's your opinion that the  
10      Federal Reserve can exercise its discretion  
11      over -- over access to that service applying  
12      those conditions?

13          A       Tell me what you mean by discretion  
14      here.

15          Q       Well, will use its judgment to manage  
16      the risk presented and determine what the  
17      appropriate collateral level is, et cetera.

18          A       It's my opinion that the Federal  
19      Reserve can use its judgment consistent with the  
20      legislation and regulation in reaching ultimate  
21      conclusions, but it can't use its judgment  
22      inconsistent with its -- the legislation or

CONFIDENTIAL

Page 9

1 regulation.

2 Q Okay. And what's the legislation that  
3 gives the Fed the power to exercise its  
4 discretion over -- to apply those conditions that  
5 you were just describing?

6 A The Federal Reserve Act at it's been  
7 amended over the years.

8 Q And which provision?

9 A So the discount window -- I can't speak  
10 to every provision because the Federal Reserve  
11 Act is a complex statute, but at least Section  
12 10B would be relevant to the -- to the discount  
13 window, but other -- other sections as well  
14 govern, you know, the -- the scope of -- of  
15 authority of the Federal Reserve.

16 Q Are you familiar with Fedwire?

17 A I am.

18 Q What is Fedwire?

19 A Fedwire is a payment rail that is owned  
20 and operated by the Federal Reserve.

21 Q Okay. So does the -- in your opinion,  
22 does the Federal Reserve have discretion to

CONFIDENTIAL

Page 10

1 impose conditions on access to Fedwire to legally  
2 eligible, state-chartered depository  
3 institutions?

4 A I haven't looked sufficiently to see  
5 the -- the context around Fedwire's  
6 implementation to understand whether the judgment  
7 we're talking about would be consistent with --  
8 with the law in the same way that I have with the  
9 passage and implementation of the Monetary  
10 Control Act.

11 Q Okay. But your opinion on the meaning  
12 of the Monetary Control Act implicates access to  
13 Fedwire, right?

14 A Insofar as Fedwire is a priced service  
15 offered by the Federal Reserve as -- as relevant  
16 to the Monetary Control Act, yes.

17 Q Okay. And -- but are you saying that  
18 you haven't looked at whether there are other  
19 statutes that bear on the Federal Reserve's  
20 ability to apply discretion to access to Fedwire?

21 A That's right.

22 Q Okay. What did you do to prepare for

CONFIDENTIAL

Page 29

1 Q Irrespective of which state's issuing  
2 the charter?

3 A That's right.

4 Q And even irrespective of whether it's a  
5 territory issuing the charter, correct?

6 A I understand in the banking laws that  
7 state is defined to include the District of  
8 Columbia and the territories of the United  
9 States.

10 Q Okay. And this access would be  
11 irrespective of whether the state-chartered  
12 depository institution has insurance, right?

13 A There I would say whether it has  
14 eligibility to apply for insurance, but  
15 irrespective of whether that insurance has been  
16 received.

17 Q Okay. And the access would be  
18 available -- the Fed's priced services would be  
19 available irrespective of whether the institution  
20 presented risk to the federal payment system?

21 A The -- I'm trying to think through that  
22 question as it relates to my answer earlier about



CONFIDENTIAL

Page 30

1 the discount window. Certainly, it is the case,  
2 as we have seen recently in the spring of 2023,  
3 that the Federal Reserve has cut off insolvent  
4 institutions from access to its services, and I  
5 don't express the opinion that they have done so  
6 inconsistent with the intentions of the framers  
7 of the MCA when they acted in that way.

8 So if that -- if we take your question  
9 about risk to include situations where a legally  
10 eligible depository institution has become  
11 insolvent, then I would think that risk is  
12 relevant to -- to that question.

13 To the extent that it is giving the Fed  
14 discretion to block legally eligible depository  
15 institutions, then I would say that that -- that  
16 that discretion was not -- is inconsistent with  
17 the intentions of the framers of the MCA.

18 Q So your bottom line is that a  
19 state-chartered depository institution that's  
20 legally eligible can get access to the Fed's  
21 priced services even if doing so presents risk to  
22 the payment system?

CONFIDENTIAL

Page 31

1           A       That is my opinion, yes.

2           Q       Okay. And is it also your opinion that  
3 a legally eligible, state-chartered depository  
4 institution can get access to Fed services even  
5 if doing so would hinder the Fed's ability to  
6 implement monetary policy?

7           A       That is my opinion, yes.

8           Q       And it's your opinion that that was  
9 what was intended by Congress in 1980?

10          A       Yes. Now, there are -- there were  
11 discussions in -- in the late fall of 1979 and  
12 winter of 1980 that preceded the passage of the  
13 MCA that were focused on the ways that the regime  
14 that preceded the MCA had complicated efforts for  
15 monetary policy. That explains the motivation  
16 for the equalization treatment that the MCA  
17 framers intended, but the MCA discussion did not  
18 include discussion of prospective alteration of  
19 that authority by the Federal Reserve  
20 unilaterally to assist future changes in monetary  
21 policy. That was a long answer to your question.

22                   So the short answer is, I -- it is my

CONFIDENTIAL

Page 32

1 opinion that the Federal Reserve does not have  
2 the discretion to both define its monetary policy  
3 space and then to exclude legally eligible,  
4 state-chartered depository institutions from its  
5 priced services in service of that monetary  
6 policy space.

7 Q And do you understand that what -- what  
8 Congress intended to accomplish in the Monetary  
9 Control Act is -- is a legal dispute in this  
10 case?

11 A No.

12 MR. SCARBOROUGH: Objection to form.

13 THE WITNESS: I don't understand that,  
14 no.

15 BY MR. MICHAELSON

16 Q Okay. You -- you're a lawyer, right?  
17 You went to law school?

18 A I did go to law school, yes.

19 Q And you -- you clerked for a judge,  
20 two, correct?

21 A For two judges, yes.

22 Q For two judges. So how -- how do

CONFIDENTIAL

Page 33

1 courts go about interpreting statutes?

2 MR. SCARBOROUGH: Objection.

3 THE WITNESS: I don't know how -- you  
4 know, this is the subject of great scholarly  
5 debate, how they do, how they should. Courts are  
6 different in different ways.

7 I'm not offering -- the reason I  
8 don't -- I didn't agree with your earlier  
9 question is that I -- I offer my expertise here  
10 as a historian of banking, and I'm not offering  
11 an opinion on the legal interpretation of the  
12 statute. And so the intentions of the statutory  
13 framers, while maybe useful to the Court in terms  
14 of interpreting specific provisions, my -- of  
15 the -- of the statute, that I would regard as a  
16 legal dispute.

17 What I'm offering is a perspective on  
18 the Fed's history from 1913 to 1980, how members  
19 of Congress and others understood the changes  
20 that occurred in 1980, and then how the Federal  
21 Reserve understood and implemented those changes  
22 from 1980 to 2015, and then, finally, how it

CONFIDENTIAL

Page 81

1 Central Bank of Bangladesh.

2 Q You first reference the regulatory  
3 framework around Fedwire. What are you referring  
4 to there?

5 A The Federal Reserve issued rules  
6 governing the use of Fedwire, as I recall. I  
7 don't have them in front of me or could -- I  
8 could offer you its -- its citation, but it has  
9 rules about the use of Fedwire by master account  
10 holders.

11 Q And when were those first promulgated,  
12 those rules?

13 A I don't recall the date.

14 Q Was it in the 1980s?

15 A I think it would have been the late  
16 1980s, but I'm not certain of that. It might  
17 have been -- it might have been before or after.  
18 I can't say.

19 Q In any event, was it before 2000?

20 A Before -- it was before 2000.

21 Q Okay. And this would be an instance of  
22 the Federal Reserve imposing conditions on master

CONFIDENTIAL

Page 82

1 account holders' access to wire transfer  
2 services, correct?

3 A No, I don't see it that way.  
4 Conditions, I think of being bespoke,  
5 idiosyncratic, applicable to individual account  
6 holders. These are regulations that apply to all  
7 account holders in making their use of Fedwire  
8 services. So I think regulation is the term that  
9 I would use to describe the way that the Fed  
10 interacted with master account holders in this  
11 respect.

12 Q Are you aware of any instance in which  
13 the Federal Reserve publicly claimed that it had  
14 the authority to terminate a specific master  
15 account holder's access to Fedwire prior to 2015?

16 A I -- I am not aware of an instance such  
17 as that.

18 Q Okay. All right. So we're marching  
19 through these covered services here.

20 And with respect to No. 2, the check  
21 collection services, you recalled, in the 1980s,  
22 the Federal Reserve terminating access to that

CONFIDENTIAL

Page 83

1 service for certain master account holders,  
2 correct?

3 A That's right.

4 Q And with respect to wire transfer  
5 services, is your testimony that through the  
6 regulatory framework promulgated by the Fed,  
7 they've restricted access to those services to  
8 certain master account holders under certain  
9 conditions?

10 MR. SCARBOROUGH: Objection to form.

11 THE WITNESS: No. I -- I can't recall  
12 the specific contours of its regulatory framework  
13 and whether it excluded specific master account  
14 holders. I know that it did create the rules of  
15 engagement for all master account holders. What  
16 more those rules had, I would have to -- I'd need  
17 to be refreshed by reviewing those rules --

18 MR. MICHAELSON: Okay.

19 THE WITNESS: -- before I could  
20 comment.

21 BY MR. MICHAELSON

22 Q Moving on to No. 4, Automated Clearing

CONFIDENTIAL

Page 104

1 A That's right.

2 Q But it's also your opinion that from  
3 1980 to 2015, the Federal Reserve asserted the  
4 authority to terminate a master account holder's  
5 access to services?

6 A That's right.

7 Q Okay. Let's go to page -- paragraph --  
8 well, paragraph 42 is -- this is legislative  
9 history concerning passage of the Monetary  
10 Control Act?

11 A This is the testimony of fed chair --  
12 then Fed Chair Paul Volcker discussing his view  
13 on the proposed change of law, which he  
14 supported.

15 Q And paragraph -- it sets the  
16 legislative history of the Monetary Control Act,  
17 correct?

18 A Yes. So I would regard that to be as  
19 part of the legislative history, yes.

20 Q And paragraph 43 also contains  
21 legislative history on the Monetary Control Act?

22 A That's right, testimony of one of the



CONFIDENTIAL

Page 105

1 bill's sponsors.

2 Q Okay. And you -- you'd agree that the  
3 presentation of legislative history on the  
4 Monetary Control Act reflected in your opinion is  
5 not complete, correct?

6 MR. SCARBOROUGH: Objection.

7 THE WITNESS: Can you define for me  
8 what a complete legislative history would be?

9 BY MR. MICHAELSON

10 Q Well, isn't it the case that part of  
11 the legislative history of the Monetary Control  
12 Act reflects a concern among Congress that the  
13 percentage of banks or Fed members was declining?

14 A That was the concern of some members of  
15 Congress, no question.

16 Q All right. Federal membership was  
17 declining, correct?

18 A That's right.

19 Q And that was a concern for banking  
20 regulators, correct?

21 A For -- the decline in Fed membership  
22 rates was a concern for some bank regulators, not

CONFIDENTIAL

Page 106

1 all.

2 Q And what was the concern?

3 A The concern here was that in the fall  
4 of 1979, the Federal Open Market Committee  
5 launched a wholesale reorientation of its  
6 monetary policy regime that required more  
7 varieties of -- of efforts to control monetary  
8 policy. And Paul Volcker's concern and the  
9 concern of some others that the Federal Reserve,  
10 although not a concern shared by all, was that  
11 the ability to manage this new monetary policy  
12 system was limited by the decline in Fed  
13 membership.

14 Q And so -- so fair to say that  
15 Volcker's -- well, Volcker's concern was that  
16 declining Fed membership could impair the Federal  
17 Reserve's ability to implement monetary policy?

18 A That's right.

19 Q And so one purpose of the Monetary  
20 Control Act was to reinforce the Federal  
21 Reserve's ability to implement monetary policy?

22 A That's right.

CONFIDENTIAL

Page 107

1 Q And one way that it did that is by  
2 empowering the Federal Reserve to impose reserve  
3 requirements on depository institutions, correct?

4 A That's right.

5 Q Including state-chartered nonmember  
6 depository institutions, correct?

7 A That's right.

8 Q In that sense, the Monetary Control Act  
9 increased the Federal Reserve's authority over  
10 the banking system?

11 A That's right.

12 Q Okay. And that's not reflected here in  
13 paragraphs 42 and 43 of your report, correct?

14 A That's right.

15 Q Okay. Let's -- let's go to -- well,  
16 sticking with paragraph 45 here, you write --  
17 it's on the top of page 18 -- that no provision  
18 of the Monetary Control Act exempts a particular  
19 Federal Reserve payment service or indicates that  
20 providing payment services would be a  
21 discretionary matter with the Federal Reserve?

22 A Not that I saw either in -- either in

CONFIDENTIAL

Page 108

1 any of the bills or in the ultimate statute that  
2 they produced.

3 Q So referring to Exhibit 300, which  
4 is -- which is 248a, under (c), subsection  
5 (c)(2), there's a clause -- I'll direct your  
6 attention to the clause at the end of (c)(2),  
7 which says, "except that nonmembers shall be  
8 subject to any other terms, including a  
9 requirement of balances sufficient for clearing  
10 purposes that the Board may determine are  
11 applicable to member banks."

12 Do you see that?

13 A I do.

14 Q Doesn't that section give the Federal  
15 Reserve discretionary authority over access to  
16 services?

17 MR. SCARBOROUGH: Objection to form.

18 THE WITNESS: No.

19 BY MR. MICHAELSON

20 Q What -- what does that clause refer to,  
21 then?

22 A So, again, recognizing that I'm, in my

CONFIDENTIAL

Page 117

1 a particular service between 1980 and 2015?

2 A For solvent institutions --

3 Q For solvent institutions.

4 A -- that did not fail? Again, the  
5 instance of the -- the hijacked Central Bank of  
6 Bangladesh instance, which would have been a  
7 master account holder with a transaction that was  
8 blocked, so that would be an example. That may  
9 have been after 2015, though. I can't -- I can't  
10 recall.

11 Q And how about not an actual assertion  
12 of this power, but a -- but a claim to this  
13 power? And that I mean the power to terminate  
14 access to a service for a solvent institution.

15 A I have not seen that claim, and I did  
16 not see that claim until 2015, in the instance of  
17 the Fourth Corner Credit Union.

18 MR. MICHAELSON: Okay. Let's look  
19 at -- we'll just do one more document before we  
20 break here. Mark this as Exhibit 301, I guess.

21 (Deposition Exhibit Number 301 was  
22 marked for identification.)

CONFIDENTIAL

Page 118

1 BY MR. MICHAELSON

2 Q So I put in front of you a document  
3 marked Exhibit 301, which is a document from the  
4 Federal Reserve Bank of Dallas, and it attaches,  
5 beginning the fourth page, a publication from the  
6 Federal Register.

7 Do you see that?

8 A I do see that.

9 Q And this is Federal Register, Volume  
10 50, No. 99, page 21120, titled "Policy Statement  
11 Regarding Risks on Large Dollar Wire Transfer  
12 Systems."

13 Do you see that?

14 A I do.

15 Q This is a policy that is set with an  
16 effective date in 1986.

17 Do you see that?

18 A I do.

19 Q Okay. And, actually, the Fed Register  
20 notice is at the top of the page. It's May 22nd,  
21 1985. Do you see this? Do you see that?

22 A Where are you --

CONFIDENTIAL

Page 119

1 Q Just at the top of the page.

2 A Oh, yeah. I see it. Yeah.

3 Q Okay. Is -- earlier you referred to a  
4 policy statement from around this time period  
5 regarding money transfers.

6 Is this the policy that you were  
7 referring to?

8 A It is.

9 Q Okay. So you're familiar with this  
10 policy?

11 A I am.

12 Q You've seen it before?

13 A I have.

14 Q And it's -- and it's public?

15 A It is.

16 Q What -- what is daylight -- what are  
17 daylight overdrafts?

18 A I'm not exactly sure of the precise  
19 definition. My general sense is that an  
20 overdraft that occurs in the same day with  
21 additional transactions being ordered on that  
22 same account during that same day, but I'm not

CONFIDENTIAL

Page 120

1 certain that that's true.

2 Q Okay. I'll refer you to page 21123.  
3 In the bottom -- bottom right-hand corner, this  
4 provides, "The Board is still concerned with  
5 these overdrafts, and believes that it is  
6 appropriate to take effective steps to control  
7 risks to the Federal Reserve Banks by placing  
8 more effective limits on Fedwire daylight  
9 overdrafts."

10 Do you see that?

11 A I do.

12 Q Okay. And do you agree that -- that  
13 this -- this policy is -- was public at the time?

14 A Yes.

15 Q And it reflects an assertion of Federal  
16 Reserve authority to impose conditions and  
17 restrictions on access to priced services?

18 MR. SCARBOROUGH: Objection to form.

19 THE WITNESS: Again, I would say that I  
20 see the word "conditions" and "regulations" as  
21 performing very different purposes for the Fed's  
22 assertions of authority. I hear this as creating



CONFIDENTIAL

Page 121

1 regulation rather than conditionality, which I  
2 would regard as -- conditions I would think of as  
3 more bespoke and idiosyncratic.

4 I hear -- I see in this document the  
5 regulation and the record of that regulation even  
6 as it's described as a policy statement in the  
7 Federal Register for rules that apply to the  
8 entire system as opposed to conditions placed on  
9 individual account holders.

10 Q But -- but doesn't this regulation  
11 reflect an assertion of the Federal Reserve to  
12 restrict individual institutions access to  
13 services based on risk presented by that  
14 institution?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: I don't think I  
17 understand how that -- how your last statement  
18 would be correct in the sense -- so the -- the  
19 conditions that I've seen the Federal Reserve  
20 impose on an account holder's master account are  
21 the most -- the most striking example is with the  
22 American Samoa Bank. Those I would regard as

CONFIDENTIAL

Page 122

1 conditions. They're specific to the American  
2 Samoa Bank. They cut off access to the discount  
3 window. They require additional supervisory  
4 impositions. That I see as conditions. I don't  
5 see -- I've never seen any policy statement or  
6 regulatory statement as relevant to the American  
7 Samoa Bank.

8 As I review this 1985, '86 document, I  
9 would say that this imposes a regulatory system  
10 on the use of Fedwire as opposed to  
11 conditionality, but I recognize, too, that I am  
12 defining the terms as I use them.

13 BY MR. MICHAELSON

14 Q Well, this -- this policy, you'd agree,  
15 reflects the Federal Reserve's assertion of the  
16 power to terminate access to priced services to  
17 specific institutions based on the risk presented  
18 by those institutions?

19 MR. SCARBOROUGH: Objection to form.

20 BY MR. MICHAELSON

21 Q Do you agree?

22 A Can you point me to where -- the

CONFIDENTIAL

Page 136

1 intend for the Federal Reserve to usurp the  
2 determination from other supervisory authorities  
3 that had been given that authority in other  
4 statutes.

5 BY MR. MICHAELSON

6 Q But as you've said, Congress -- it was  
7 not Congress's intent to eliminate entirely the  
8 Federal Reserve System to -- the Federal  
9 Reserve's power to conduct risk assessments of  
10 institutions with master accounts, correct?

11 A Can you point to me when -- to when I  
12 said that sentence? I don't -- I don't believe I  
13 said it that way.

14 The way I would say it is that Congress  
15 did not prevent -- again, without getting to the  
16 legal determination, the framers of the MCA did  
17 not engage substantially with the question of the  
18 Fed's risk assessments around its priced  
19 services. And, again, I can't recall any  
20 instances of that discussion.

21 Q And at least we've seen here in Exhibit  
22 301 that as of 1985, the Federal Reserve was

CONFIDENTIAL

Page 137

1 claiming the power to conduct such risk  
2 assessments, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: The -- I read Exhibit 301  
5 to contain a regulation regarding what the Fed  
6 shall do in the event of daylight overdrafts and  
7 what to do to manage the question of daylight  
8 overdrafts.

9 BY MR. MICHAELSON

10 Q Okay. And to prohibit the use of  
11 Fedwire where an institution's use of Fedwire  
12 would prevent risk to the Reserve Bank?

13 MR. SCARBOROUGH: Objection.

14 THE WITNESS: Again, just reading from  
15 it, I would say that the 1985 policy statement  
16 has a regulation that asserts the Reserve Bank's  
17 right to protect its risk exposure from those --  
18 those banks.

19 BY MR. MICHAELSON

20 Q Okay. I'm handing you a document  
21 marked Exhibit 302, which is Operating Circular 1  
22 from 1998.

CONFIDENTIAL

Page 138

1 Are you familiar with OC1?

2 A I am.

3 Q And have you seen -- this is from 1998.

4 Have you seen this version before?

5 A I have.

6 Q And this was public, right?

7 A It -- it is.

8 Q Okay. I'd direct your attention to

9 Section 1.1, called "Scope."

10 Third paragraph, it says, "Your master  
11 account is subject to Federal Reserve policies  
12 such as those on payment system risk, reserve  
13 balances and clearing balances as they may be  
14 revised from time to time."

15 Do you see that?

16 A I do.

17 Q And this is a reference to policies  
18 like the statement on large dollar wire transfers  
19 that we were just looking at?

20 A That's right.

21 Q Okay. So this -- this is also another  
22 example of the Federal Reserve asserting the

CONFIDENTIAL

Page 139

1 power to -- asserting the power to decide whether  
2 to grant use of priced service, correct?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No.

5 BY MR. MICHAELSON

6 Q Well, it's -- it's -- it's saying that  
7 your master account is subject to the policy that  
8 we were just looking at, right?

9 A That's right.

10 Q And in that policy, the Federal Reserve  
11 asserted the authority to conduct risk  
12 assessments to protect -- for the purpose of  
13 protecting Reserve Banks from risk presented by  
14 individual institutions, right?

15 MR. SCARBOROUGH: Objection.

16 THE WITNESS: That's right.

17 BY MR. MICHAELSON

18 Q Okay. And where risk was presented,  
19 the Federal Reserve was claiming the authority to  
20 cut off use of Fedwire to mitigate risk, correct?

21 MR. SCARBOROUGH: Objection.

22 THE WITNESS: Again, we have a

CONFIDENTIAL

Page 140

1 different view on -- on the question of what  
2 constitutes cutoff. And why I said no to my --  
3 in my answer to your first question was because  
4 you used the word "grant," which I took to be a  
5 verb indicating access.

6 I don't read the 1985 policy statement  
7 and don't see in the '98 Operating Circular 1 the  
8 assertion that the Fed could reimpose discretion  
9 as it has with Fed membership status on access to  
10 accounts before 1998 and the master account  
11 thereafter.

12 BY MR. MICHAELSON

13 Q Okay. I'll refer you to Section 2.3,  
14 entitled "Establishing a Account," and the last  
15 sentence of the first paragraph is "All master  
16 accounts are subject to Reserve Bank approval."

17 Do you see that?

18 A I do.

19 Q So as of 1998, the Federal Reserve was  
20 taking the position that master accounts are  
21 subject to approval by a Reserve Bank?

22 A That's right.

CONFIDENTIAL

Page 141

1           Q     And in Section 2.8 on the following  
2     page, on the right-hand side of the page, middle  
3     of top paragraph there, there's a sentence that  
4     reads, "We may close your master account or  
5     terminate our approval of a pass-through  
6     relationship at any time."

7                     Do you see that?

8           A     I do see that.

9           Q     So as of 1998, the Federal Reserve was  
10    asserting the power to close an institution's  
11    master account at any time?

12          A     That's right.

13                     MR. MICHAELSON: All right. Let's mark  
14    this.

15                     (Deposition Exhibit Number 303 was  
16    marked for identification.)

17    BY MR. MICHAELSON

18          Q     I've put in front of you a document  
19    marked 303. It's an exhibit marked 303. It's  
20    federal -- from the Federal Register, entitled  
21    "Policy on Payments System Risk," Federal  
22    Register, Volume 69, No. 230, 69926. This is



CONFIDENTIAL

Page 142

1       dated December 1, 2004.

2                       Do you see that?

3           A       I do.

4           Q       Are you familiar with this policy on  
5       payment system risk from 2004?

6           A       Generally speaking, yes. I haven't  
7       examined it thoroughly.

8           Q       When's the last time you reviewed it?

9           A       I glanced at it yesterday. Before  
10       that, it had been -- it had been several months.

11          Q       Okay. Direct your attention to the  
12       page 69929. On the far left -- left column,  
13       first full paragraph, it says, "Part II of this  
14       policy governs the provision of intraday or  
15       daylight credit in accounts of the Reserve  
16       Banks."

17                    Do you see that?

18          A       I do.

19          Q       And it says that it "sets out the  
20       general methods used by the Reserve Banks to  
21       control their intraday credit exposures."

22                    Do you see that?

CONFIDENTIAL

Page 143

1           A       I do.

2           Q       Do you agree that as of 2004, Reserve  
3 Banks were applying methods to control their  
4 intraday credit exposures?

5           A       I am not familiar with what the Federal  
6 Reserve Banks were doing in terms of their risk  
7 exposure assessments for account holders. I'm  
8 familiar only with the policy statement from 2004  
9 describing -- describing it. So I'm familiar  
10 with the policy statement, but not the --

11          Q       Not the actual --

12          A       -- practice itself.

13          Q       -- practice. But you have no reason to  
14 dispute that Reserve Banks were, in fact,  
15 undertaking methods to control their intraday  
16 credit exposures, correct?

17          A       No reason to -- I have no reason to  
18 dispute it, but I -- again, I don't -- I haven't  
19 evaluated what those methods are.

20          Q       Okay. Do you know if those methods  
21 included assessments of whether individual  
22 institutions presented risk to the Reserve Bank?

CONFIDENTIAL

Page 145

1 Q Okay. And continuing on in Section II,  
2 flip forward a couple pages to 69935. There's a  
3 Section C on net debit caps.

4 Are you familiar with a net debit cap?

5 A I am not.

6 Q Do you know what a net debit cap is?

7 A I do not.

8 Q All right. The last -- in the  
9 paragraph underneath "Net Debit Caps," the last  
10 sentence, it says, An institution must be  
11 financially healthy --

12 A I don't see where you are. I'm sorry.

13 Q Oh, so underneath "Net Debit Caps," No.  
14 1 is Definition."

15 A Yeah.

16 Q Okay. The last sentence of the first  
17 paragraph there.

18 A Yes, I see.

19 Q "An institution must be financially  
20 healthy and have regular access to the discount  
21 window in order to adopt a net debit cap greater  
22 than zero to qualify for the filing exemption."

CONFIDENTIAL

Page 146

1 Do you know what this refers to?

2 A I know in general terms what  
3 constitutes regular access to the discount  
4 window. I have a general sense of what a net  
5 debit cap is, but I don't know what the  
6 qualification for a filing exemption is.

7 Q Okay. Go ahead to 69937. The upper  
8 left corner, the last sentence of the -- of the  
9 paragraph in the upper left corner, it says, "For  
10 example, if the institution's level of daylight  
11 overdrafts constitutes an unsafe or unsound  
12 banking practice, the Reserve Bank would likely  
13 assign the institution a zero net debit cap and  
14 impose additional risk controls."

15 Do you see that?

16 A I do.

17 Q Would you agree that this reflects the  
18 Federal Reserve's assertion of power over use  
19 of -- no, strike that.

20 Would you agree that this reflects, as  
21 of 2004, the Federal Reserve's assertion of power  
22 over the use of priced service?

CONFIDENTIAL

Page 147

1 A Over its use, yes.

2 Q Okay. Including the power to impose  
3 risk controls to mitigate risk to the Reserve  
4 Bank?

5 A If we're defining zero in the net debit  
6 cap and as a risk control, which the policy  
7 statement seems to do, then yes.

8 Q Okay. Are you familiar with OC3,  
9 Operating Circular 3?

10 A Not by its name.

11 Q But do you have a general understanding  
12 of what OC3 relates to?

13 A No. I would need to review it.

14 Q When's the last time that you reviewed  
15 OC3?

16 A If you could -- if I could see it, I  
17 could tell you. I don't know what OC3 -- I mean,  
18 I know it's an operating circular, but I would  
19 need to see it before I could answer the  
20 question.

21 Q Okay. How about OC4? Do you know what  
22 OC4 is?

CONFIDENTIAL

Page 148

1 A Again, not by its name.

2 Q Sitting here today, you don't know what  
3 OC4 relates to?

4 A That's right.

5 Q Okay. And how about OC5? Are you  
6 familiar with OC5?

7 A No.

8 Q Okay. So referring back to your --  
9 referring back to your paragraph 59 here, you say  
10 you found no evidence --

11 A Can you give me a second to --

12 Q Yeah, sure.

13 A -- go back?

14 Q It's Exhibit 299, your report, at page  
15 25, paragraph 59.

16 A Okay. Paragraph what?

17 MS. CARLETTA: Page 25, paragraph 59.

18 THE WITNESS: Got it.

19 BY MR. MICHAELSON

20 Q So you're opining here that you found  
21 no evidence of the Federal Reserve asserting  
22 power to decide whether to grant priced services

CONFIDENTIAL

Page 149

1 to legally eligible depository institutions,  
2 correct? That's your -- that's your opinion  
3 here?

4 A That's right.

5 Q But would you agree that between 1980  
6 and 2015, the Federal Reserve was asserting the  
7 power to decide whether all priced services would  
8 be available to all legally eligible,  
9 state-chartered depository institutions?

10 MR. SCARBOROUGH: Objection to form.

11 THE WITNESS: No, I would not. I would  
12 say that between 1980 and 2015, at several  
13 different junctures, the Federal Reserve issued  
14 policy statements and regulations governing the  
15 general provision of its priced services,  
16 including some regulations that governed the use  
17 of those services.

18 The statement that I make -- the  
19 opinion that I offer in paragraph 59 of my report  
20 refers to the idiosyncratic decisions to grant  
21 priced services to individual legally eligible  
22 depository institutions.

CONFIDENTIAL

Page 150

1 BY MR. MICHAELSON

2 Q Well, but the -- but the regulations  
3 that you're referring to included regulations in  
4 which the Federal Reserve asserted the power to  
5 conduct risk assessments of specific  
6 institutions, correct?

7 A That's right.

8 Q And the power to impose restrictions on  
9 an individual institution's use of services based  
10 on the risk presented by that institution,  
11 correct?

12 A The key difference here between my  
13 opinion and those regulations is that I am  
14 referring to assertion of authority over specific  
15 requests to access priced services, the  
16 reciprocal for which is the granting of those  
17 priced services, not to the regulatory framework  
18 that might govern its use.

19 The policy statements that we've read  
20 together today refer to the regulatory framework  
21 for the use of priced services, including risk  
22 assessments, over their use. In the extreme



CONFIDENTIAL

Page 187

1 has issued countless banking -- pieces of banking  
2 legislation, each with -- especially after 1935  
3 and the permanent institution of the FDIC, with a  
4 specific lane of movement for the FDIC, OCC,  
5 Federal Reserve, and state banking authorities,  
6 and so the MCA comes from that legal context.

7 That legal context means that the very  
8 kinds of assessments that we're talking about  
9 here are a supervisory context for the  
10 specifically designated supervisor to respond to.  
11 In some cases, that would be the Fed, in some  
12 cases, the OCC, in others, the FDIC, and in  
13 others, the state banking authorities.

14 But for the Federal Reserve to then say  
15 that it has the authority or the -- or it would  
16 adopt the practice of usurping these other  
17 entities within a financial system is something  
18 that I am not aware of anyone around the passage  
19 of the MCA even contemplating, including at the  
20 Federal Reserve, because it had never been done  
21 in that way before.

22 Q If every bank is unique then isn't it

CONFIDENTIAL

Page 188

1 necessary for Reserve Banks to undertake an  
2 individualized risk assessment of each  
3 institution to assess the risk presented by that  
4 institution to the Reserve Bank?

5 A Most emphatically, no. What it should  
6 do is defer to those exact determinations by the  
7 appropriately situated authority to -- that has  
8 been put in place to assess precisely that risk  
9 profile. And, again, that might be the Fed if  
10 we're talking about member banks, bank holding  
11 companies, financial holding companies, et  
12 cetera, but it might be the OCC, and it might be  
13 the FDIC, and it might be a state banking  
14 authority.

15 Q So for Custodia that would be the  
16 Wyoming Division of Banking?

17 A That's right.

18 Q And so it's your opinion that the  
19 Federal Reserve Bank of Kansas City has to defer  
20 to Wyoming Division of Banking's assessment of  
21 the risk that Custodia presents to the Federal  
22 Reserve Bank of Kansas City?

CONFIDENTIAL

Page 189

1           A       That's right. That deference is the  
2       beating heart of the dual banking system.

3           Q       Okay. And it's your opinion that  
4       Congress intended through the Monetary Control  
5       Act to empower states to be state-chartered --  
6       states to be the gatekeepers of access to Federal  
7       Reserve services?

8           A       Well, the Constitution does -- does  
9       that even preceding the creation of the Federal  
10      Reserve System by creating state banks.

11                   The Federal Reserve System was created  
12      institutionally on top of a system of  
13      state-chartered banks and national-chartered  
14      banks, and so the order of operations is  
15      reversed. The states come first and then the  
16      Federal Reserve.

17          Q       So referring back to the guidelines,  
18      principle 2, here the Board is saying that  
19      Reserve Banks should -- connection with an  
20      account access request should consider whether  
21      the institution presents or creates risk to the  
22      Reserve Bank.

CONFIDENTIAL

Page 190

1 Do you see that?

2 A Which -- which subpoint? Sorry.

3 Q Principle -- Principle No. 2 on page  
4 36.

5 A I see that. And is there a subpart  
6 that you're reading or just --

7 Q No, just --

8 A -- the top? Yeah.

9 Q -- the -- just Principle No. 2.

10 A Yeah.

11 Q And it's your opinion that what  
12 Congress intended with the Monetary Control Act  
13 is that this consideration be handled by the  
14 state banking authority?

15 A No. To be handled by the Federal  
16 Reserve for member banks and for bank holding  
17 companies and financial holding companies, for  
18 the FDIC for state, nonmember banks that were  
19 members of the deposit insurance corporation or  
20 the system, for the Comptroller of the Currency  
21 for national banks and for state banking  
22 authorities for those few banks that were not

CONFIDENTIAL

Page 196

1 institution imposes risk. Risk cannot be  
2 eliminated. They all do. That was true in 1980,  
3 and it's true in 2023.

4 And what the framers of the MCA were  
5 saying is the Federal Reserve is now out of the  
6 business of conditioning access to its priced  
7 services on its own assessments of what is good  
8 and right and just and true for the Federal  
9 Reserve System or for America or for the world.  
10 It was saying that we are going to bring the  
11 entire dual banking system into that threshold  
12 assessment and make those priced services  
13 available to all.

14 Q So you're saying that every snowflake  
15 gets not only an account, but also the use of the  
16 services therein, even if they present risk to  
17 the Federal Reserve System?

18 A And here again, that is a tautology,  
19 because every bank presents risk. Every single  
20 bank presents risk. There's no such thing as a  
21 risk-free bank, even one that doesn't have  
22 customers, and so, in that sense, saying that

CONFIDENTIAL

Page 197

1 every bank that presents risk that is legally  
2 eligible as a depository institution is the same  
3 as saying every legally eligible depository  
4 institution.

5 Q I see. And so it's your opinion this  
6 is what the framers of the Monetary Control Act  
7 intended, that every snowflake gets to use the  
8 services, even if they present risk to the  
9 system?

10 A So, again, the term "snowflake bank" is  
11 a term of art at this table. I quite like it.  
12 It's definitely not something that Senator  
13 Proxmire was thinking about, but he was thinking  
14 very carefully about the question of, in his  
15 words, open access. And so the idea that the  
16 Federal Reserve would then be able to sneak in a  
17 risk assessment that would block access as though  
18 access were still on the pre-1980 membership  
19 status would be inconsistent with the intentions  
20 of Senator Proxmire and his associates and that  
21 Congress.

22 Q Okay. And it's also your opinion if

CONFIDENTIAL

Page 198

1 the Reserve Bank is conducting an individualized  
2 risk assessment of a bank and determines that  
3 that bank had -- does present risk to the system  
4 that it can restrict use of services, but not  
5 entirely?

6 A It can -- I don't express the opinion  
7 that it can do so in an idiosyncratic, bespoke  
8 fashion. I do express the opinion that through  
9 regulation creating clear parameters of the use  
10 of its priced services that does not constitute  
11 the elimination of access, either in effect or in  
12 fact, that that regulatory framework is  
13 consistent with the way the Fed has responded to  
14 the MCA since its passage.

15 Again, I don't make a legal  
16 determination about whether it has the authority  
17 to do so, as your question posed, but about  
18 whether it's consistent with practice.

19 MR. MICHAELSON: Okay. It's about --  
20 we've been going over an hour, and it's about  
21 noon. Should we continue for a bit or break for  
22 lunch? Do you have -- do you have a preference?

## CONFIDENTIAL

Page 199

1 MR. SCARBOROUGH: I leave it up to you.

2 THE WITNESS: I mean, I'm good.

3 MR. SCARBOROUGH: Do you want to -- do  
4 you want to take like five minutes and then do  
5 another 30, 45 minutes, and then grab lunch or --

6 MR. MICHAELSON: Well, whatever --  
7 whatever you prefer.

8 THE WITNESS: You guys are the ones  
9 that have been to this rodeo before. I don't  
10 know. But I'm comfortable going or breaking or  
11 --

12 MS. CARLETTA: Lunch is ready.

13 MR. MICHAELSON: Yeah.

14 THE WITNESS: -- whatever you want.

15 MR. SCARBOROUGH: Is lunch ready?

16 MR. MICHAELSON: Yeah.

17 MS. CARLETTA: Lunch is ready.

18 MR. MICHAELSON: Lunch is ready. Why  
19 don't we break for lunch, and we'll come back.

20 THE WITNESS: Okay.

21 (Whereupon, at 12:00 p.m., a  
22 luncheon recess was taken.)



CONFIDENTIAL

Page 215

1 framework in the way that you and I might.

2 Q So if an institution requests a master  
3 account from a Reserve Bank -- well, strike that.

4 A Reserve Bank is exposed to risk  
5 arising from the provision of services to an  
6 entity with a master account, correct?

7 A That's right.

8 Q And is it your opinion that there are  
9 restrictions on Reserve Banks' ability to manage  
10 that risk?

11 A I don't offer legal opinions of what  
12 the Fed can and cannot do. I can opine that the  
13 intentions of the framers of the MCA intended to  
14 remove the Federal Reserve from exercising risk  
15 management or other discretionary practices to  
16 turn access to services into a quasi-membership  
17 status. And so, in that sense, what the Federal  
18 Reserve has been instructed to do, at least by  
19 the intentions of the MCA's framers, is to use  
20 the risk assessments that had been performed by  
21 either the sister regulatory and supervisory  
22 organizations at the federal level or by the

CONFIDENTIAL

Page 216

1 state authorities in our federal system of dual  
2 banking.

3 Q When you say the framers of the MCA,  
4 who -- who are you referring to?

5 A Members of Congress, other participants  
6 who lobbied for its -- its passage, people like  
7 Paul Volcker, William Proxmire, people like that.

8 Q Okay. And so you are expressing the  
9 opinion that they intended to restrict Reserve  
10 Banks' ability to manage the risk presented by  
11 the grant of master accounts to -- to  
12 institutions?

13 (Cell phone interruption.)

14 MR. SCARBOROUGH: Objection.

15 THE WITNESS: Are you objecting to  
16 yourself? Okay.

17 MR. MICHAELSON: He was objecting to  
18 me.

19 THE WITNESS: Yeah.

20 BY MR. MICHAELSON

21 Q It is -- it is your opinion that the --  
22 that the intent behind the Monetary Control Act

CONFIDENTIAL

Page 217

1 was to restrict Reserve Banks' ability to manage  
2 the risk presented by master accounts?

3 MR. SCARBOROUGH: Objection.

4 THE WITNESS: No, not in those terms.  
5 It's my testimony that the framers of the MCA  
6 intended for the Federal Reserve to engage with  
7 other government entities to engage in whatever  
8 risk assessments it felt it needed to engage with  
9 respect to depository institutions that it, prior  
10 to 1980, might engage bilaterally with respect to  
11 access to those services.

12 After 1980, the expectation by the  
13 framers would be that the Federal Reserve engage  
14 on those very questions, should they have them,  
15 with other -- other government entities.

16 But here again, I'm not citing any  
17 specific statement to that effect because this is  
18 not a question that they were contemplating in  
19 terms of the specific processes of risk  
20 assessment or counterparty risk or -- or daylight  
21 overdrafts or the like. I didn't see discussion  
22 at that level of specificity, so my opinion is at

CONFIDENTIAL

Page 218

1 a level of abstraction higher.

2 BY MR. MICHAELSON

3 Q Did the Monetary Control Act impose on  
4 states any new obligations to assess risk  
5 presented to Reserve Banks by the issuance of  
6 master accounts and services?

7 A I'll leave the legal interpretation of  
8 the MCA to the Court to determine, so I can't --  
9 I don't have an opinion about what the MCA  
10 imposed or did not impose.

11 Q You don't have an opinion on what the  
12 MCA imposed or did not impose?

13 A I don't have an opinion about the legal  
14 interpretation of the scope of the MCA in terms  
15 of the authorities or restrictions that it  
16 placed.

17 Q Okay. But you are opining on the  
18 intent -- the legislative intent behind the  
19 statute, right?

20 A (Nodding.)

21 Q And did --

22 MS. CARLETTA: Hold on. You have to

CONFIDENTIAL

Page 219

1 answer verbally. Sorry.

2 THE WITNESS: Yes, that's right.

3 BY MR. MICHAELSON

4 Q And did the legislators who passed the  
5 MCA intend to impose on states the obligation to  
6 assess risk presented to Reserve Banks by the  
7 issuance of master accounts to state-chartered  
8 nonmember institutions?

9 A It's my opinion that that is the  
10 implication of the framers' intention, although  
11 they did not state that exact fact, so I'm not  
12 quoting one of the MCA's framers to that effect.

13 What I -- the expert opinion that I  
14 offer in terms of the legislative history of the  
15 MCA is that the framers intended to remove the  
16 Federal Reserve from its position, former  
17 position, of engaging in precisely these kinds of  
18 assessments and to leave those assessments to the  
19 other relevant governmental agencies at the state  
20 or federal level.

21 Q So you're saying that it was an  
22 unintended consequence of the Monetary Control

CONFIDENTIAL

Page 220

1 Act?

2 A No.

3 MR. SCARBOROUGH: Objection.

4 BY MR. MICHAELSON

5 Q You're saying it's just an unstated  
6 implication of the Monetary Control Act?

7 MR. SCARBOROUGH: Objection.

8 THE WITNESS: I'm saying it's an  
9 implication of their decision to remove the  
10 Federal Reserve from engaging in threshold-level  
11 evaluations about whether legally eligible  
12 depository institutions can gain access to  
13 Federal Reserve services.

14 BY MR. MICHAELSON

15 Q So did the framers of the MCA, in your  
16 view, intend that result or not?

17 A They did intend that result.

18 Q They did?

19 A Yes.

20 Q While at the same time imposing no new  
21 obligations on the states to consider risk to  
22 Reserve Banks?

CONFIDENTIAL

Page 221

1           A       The obligations on the states that did  
2       exist were defined primarily by state law, except  
3       insofar as these state depository institutions  
4       sought to gain membership either to the federal  
5       deposit insurance system or to the Federal  
6       Reserve system.

7           Q       To your knowledge, is there any statute  
8       that requires the Wyoming Division of Banking to  
9       consider risks to the Reserve Bank of Kansas City  
10      presented by state-chartered institutions subject  
11      to its supervision?

12          A       Not to my knowledge, no.

13          Q       Okay. In front of you is the condition  
14      monitoring guidelines, 2019. It's exhibit --  
15      Exhibit 55 in this case. And this section on  
16      page 6 concerns risk ratings.

17                 Is -- is it your understanding that the  
18      implication of the Monetary Control Act is that  
19      these risk ratings should be assessed and applied  
20      by the Wyoming Division of Banking and not the  
21      Reserve Bank of Kansas City for state-chartered  
22      nonmember institutions?

CONFIDENTIAL

Page 222

1 MR. SCARBOROUGH: Objection.

2 THE WITNESS: I don't offer an opinion  
3 about the soundness or lack thereof of these  
4 specific categories, no.

5 BY MR. MICHAELSON

6 Q My -- my question is: What did -- when  
7 Congress passed the Monetary Control Act, did it  
8 intend for Wyoming to take over the  
9 responsibilities reflected in this exhibit?

10 A So a few parts in my answer to your  
11 question. So the first is, I'm not aware that  
12 these responsibilities existed in 1980 as they  
13 are defined here, so I don't think that the  
14 framers of the MCA had these specific  
15 responsibilities in mind.

16 It is my testimony that the framers of  
17 the MCA intended for the Federal Reserve to defer  
18 to the supervisory assessments made by the  
19 supervisors, which the Federal Reserve was not  
20 for nonmember banks other than for holding  
21 companies and -- and others identified by  
22 statute.



CONFIDENTIAL

Page 235

1 banking history, including the passage of various  
2 statutes.

3 Q Are you expressing an opinion about  
4 congressional intent on any statute other than  
5 the Monetary Control Act?

6 A Not -- not as such, except in service  
7 of the opinion that I offer about what the  
8 framers of the MCA intended to do.

9 Q Are you expressing an opinion about  
10 the -- are you familiar with Section 342 that  
11 says Reserve Banks may accept deposits?

12 A Of the Federal Reserve Act, yeah.

13 Q Yes?

14 A Yes.

15 Q You're familiar with that?

16 A Yes.

17 Q Are you expressing an opinion on the  
18 congressional intent behind that opinion?

19 A No.

20 Q Okay. And are you able to point to any  
21 federal statute that authorizes Reserve Banks to  
22 take actions to mitigate risk to that Reserve

CONFIDENTIAL

Page 236

1 Bank presented by state-chartered nonmember banks  
2 with master accounts?

3 A I don't offer opinions about what  
4 statutes authorize or don't authorize, which I  
5 would regard as a legal conclusion left to the  
6 Court to decide.

7 MR. MICHAELSON: Let's mark this  
8 document here.

9 (Deposition Exhibit Number 304 was  
10 marked for identification.)

11 BY MR. MICHAELSON

12 Q I'm handing you a document marked 304,  
13 Exhibit 304, which is entitled -- entitled  
14 "Guidance for Federal Reserve Financial Services  
15 Applicants That Are Deemed High Risk by the  
16 Federal Reserve Bank of New York."

17 Do you see that?

18 A I do.

19 Q And I'll refer you to the end. At the  
20 very end, you'll see that it's dated August 18,  
21 2014. Do you see that?

22 A I do.

CONFIDENTIAL

Page 237

1 Q I'll give you a moment to review it,  
2 and my question is whether you've seen it before.

3 A May I ask, this is a public document?

4 Q It is a public document.

5 A It looks familiar to me, but I don't  
6 know that I have -- if I have relied upon it for  
7 my report. I don't think that I did, but it is  
8 very possible that I have seen it before.

9 Q Okay. And it says in the second  
10 paragraph that for each high-risk applicant for  
11 Federal Reserve services, the Bank will conduct  
12 enhanced due diligence and risk assessment, and  
13 the Bank may take steps to mitigate risks posed  
14 by the applicant.

15 Do you see that?

16 A I do.

17 Q Are you expressing an opinion on this  
18 case on whether, in 2014, the Federal Reserve  
19 Bank of New York had statutory authority to do  
20 that?

21 A I don't express opinions about whether  
22 the -- what statutory authority the Federal

CONFIDENTIAL

Page 238

1 Reserve or any of its Reserve Banks does or does  
2 not have.

3 Q Okay. But it is your opinion, though,  
4 that this conduct by the Federal Reserve Bank of  
5 New York would be inconsistent with the intent of  
6 the drafters of the Monetary Control Act?

7 A Not necessarily. It depends entirely  
8 on what is meant by the steps taken to mitigate  
9 risk, risks posed by the applicant.

10 Q I see. So if those steps to mitigate  
11 risk included restricting access to a service to  
12 mitigate risk without entirely eliminating use of  
13 the service, that could be consistent with the  
14 Monetary Control Act?

15 MR. SCARBOROUGH: Objection to form.

16 THE WITNESS: It might be. I'd need to  
17 know more about what -- the nature of the service  
18 restrictions, the process through which that  
19 conclusion was reached and what relationship the  
20 Federal Reserve Bank had with the supervising  
21 authority, supervising authority of the legally  
22 eligible depository institution.

CONFIDENTIAL

Page 244

1 master account based on the Fed's own assessments  
2 of credit and other risks may be entirely  
3 consistent with the Fed's historical practice  
4 following 1980, correct?

5 A I -- I doubt that very much. I do not  
6 think that is true, in fact.

7 Q So you are expressing an opinion on  
8 whether -- whether the Fed had a historical  
9 practice of conducting an evaluation like this  
10 prior to 2022?

11 A So in my search of the news coverage of  
12 accounts and master accounts, I found documents,  
13 for example, from the Dallas Fed and news  
14 statements from the Cleveland Fed talking about  
15 the fact that new applications for a master  
16 account would be acted upon within days. The  
17 idea that this would happen so quickly seems  
18 inconsistent to me to the searching evaluation  
19 that I described following the promulgation of  
20 these guidelines in 2022.

21 Q I see. So you relied -- and you relied  
22 on those documents from -- it was the Dallas Fed?

CONFIDENTIAL

Page 245

1           A       I believe it was the Dallas Fed and  
2       then statements again from the Cleveland Fed and  
3       perhaps the Dallas Fed, too, in the news.

4           Q       All right. Have you seen Exhibit 304?

5           A       What is that?

6           Q       Guidance for Federal Reserve Financial  
7       Services Applicants Deemed High Risk by New  
8       York -- Reserve Bank of New York.

9           A       I see that now. I didn't rely on this  
10      for my report, but having gone through it with  
11      you today, it doesn't change my opinion.

12          Q       Okay. It doesn't change your opinion  
13      even though it says on page 1, for each high-risk  
14      applicant, the Reserve Bank of New York will  
15      conduct enhanced due diligence and a risk  
16      assessment?

17          A       The -- I do see that and I don't -- it  
18      doesn't change my opinion because I don't know  
19      how they reached the determination of high-risk  
20      applicants. It may have been something -- and I,  
21      in fact, assume that it would be -- something  
22      that occurred well after the fact that an account

CONFIDENTIAL

Page 246

1 had been given to a legally eligible depository  
2 institution, and that fact makes this  
3 inconsistent with the searching evaluation that's  
4 described in 2022 to gain access to those  
5 services in the first instance.

6 Now, it may well be that the policy  
7 document that we're seeing here refers to that  
8 access in general, but the document itself  
9 doesn't stand for the proposition of the  
10 individual assessments that may or may not have  
11 occurred.

12 Q Okay. You see, though, on the first  
13 paragraph it says that it applies where a  
14 financial institution is, quote, seeking an  
15 account or requesting to use one or more  
16 financial services, right?

17 Do you see that?

18 A I do see that.

19 Q Does that change your opinion?

20 A It doesn't change the opinion offered  
21 in my expert report. The opinion I offer in my  
22 expert report about whether there's a searching

CONFIDENTIAL

Page 247

1 evaluation for the attempts to execute a master  
2 account agreement is not contradicted by the 2014  
3 New York Fed policy statement, because the New  
4 York Fed policy statement, it refers to those  
5 applicants who are already deemed high risk at  
6 the point of application as opposed to an  
7 undertaking that reviews that status.

8 I do not see anything in the New York  
9 document that suggests all -- all attempts to  
10 execute a master account agreement were subject  
11 to the evaluations described in this document,  
12 only, in fact, to those that were considered to  
13 be a, quote-unquote, high-risk applicant.

14 Q Well, the second paragraph said that  
15 the bank deemed certain categories of financial  
16 institutions seeking an account to be high-risk  
17 applicants.

18 Do you see that?

19 A I do see that.

20 Q So isn't it -- isn't it New York that's  
21 deciding -- the Federal Reserve Bank of New York  
22 deciding whether an applicant is a high-risk



CONFIDENTIAL

Page 248

1 applicant, and if so, conducting enhanced due  
2 diligence and risk assessment before providing  
3 that applicant access to services in 2014?

4 A As I look at the rest of the document  
5 and see the kinds of high risk that they're  
6 talking about, it refers to AML and OFAC. AML  
7 refers to Anti-Money Laundering and OFAC refers  
8 to the Office of Foreign Asset Control. And the  
9 kinds of organizations that are deemed high risk,  
10 besides a catch-all category at the end, refers  
11 to those institutions that are either chartered  
12 or exist outside of the United States, which is  
13 indeed what an Edge Act is -- Edge Act or  
14 agreement corporation and the like.

15 I would regard this, then, to be  
16 applicable not to, necessarily, those,  
17 quote-unquote, legally eligible depository  
18 institutions as that category was -- to the  
19 extent that I understand that category in line  
20 with the intentions -- intentions of the framers  
21 of the MCA, because this is dealing with foreign  
22 banks, largely, which is not the primary concern

CONFIDENTIAL

Page 249

1 of the MCA.

2 Q You interpret this as applying largely  
3 to foreign banks?

4 A I do.

5 Q So it's your opinion that as you read  
6 this today, this is consistent with the framers'  
7 intent of the Monetary Control Act?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: As I read this today, it  
10 is appropriate -- it is consistent with the --  
11 with the framers of the Monetary Control Act  
12 because the high-risk applicants identified by  
13 the New York Fed, all of which would be  
14 supervised by the New York Fed, not by individual  
15 states in the United States or by the Comptroller  
16 of the Currency or the FDIC.

17 BY MR. MICHAELSON

18 Q So it's your testimony that this  
19 doesn't apply to state-chartered nonmember banks?

20 A I don't offer testimony about the  
21 application of the Fed's own policy statements or  
22 regulations, which I would regard as a legal

CONFIDENTIAL

Page 402

1 proposed -- each bank is unique in its --

2 Q I see.

3 A -- risk profile, and so I don't know  
4 how I would answer that question.

5 Q So your view, then, is that this --  
6 this notification -- this -- this comment in the  
7 S letter about preliminary notification to Board  
8 staff, which makes reference to requests that  
9 raise novel issues, that that would encompass  
10 every request because every bank raises novel  
11 issues?

12 A Elsewhere in either the S letter or in  
13 the guidelines -- I think it's the S letter -- it  
14 makes clear that even for those banks, the  
15 so-called Tier 1 institutions that are not  
16 engaged in what the Board calls, quote-unquote,  
17 novel forms of banking, may be subject to exactly  
18 this kind of searching evaluation.

19 And so it -- there is no limiting  
20 principle that I can discern in the S letter or  
21 in the guidelines that would give a single bank  
22 comfort that it will have a straightforward

CONFIDENTIAL

Page 403

1 process similar to what predominated between 1980  
2 and 2015.

3 Q Okay. But let's be clear about what  
4 was -- your knowledge of what was happening from  
5 1980 to 2015.

6 You have no basis to opine on whether  
7 Reserve Banks were conducting risk assessments on  
8 institutions that requested master accounts from  
9 1980 to 2015, correct?

10 A No, that's not correct.

11 Q Okay. We looked at earlier, for  
12 example, the New York Fed policy for high-risk  
13 institutions for 2014, right?

14 A We -- we did look at that document,  
15 yes.

16 Q Okay. Were you aware of that before  
17 today?

18 A I was not aware of that document before  
19 today, no.

20 Q Okay. That reflects that Reserve Banks  
21 were conducting risk assessments of entities  
22 requesting a master account prior to 2015,

CONFIDENTIAL

Page 404

1 correct?

2 A No.

3 Q Okay. So in 2015, when Fourth Corner  
4 came around, which is brand new, for the first  
5 time, Federal Reserve Bank conducting a risk  
6 assessment of an entity requesting a master  
7 account?

8 MR. SCARBOROUGH: Objection to form.

9 THE WITNESS: Do you have a question?

10 BY MR. MICHAELSON

11 Q Yeah. Was that -- you're saying that  
12 Fourth Corner in 2015 was the first time that a  
13 Reserve Bank subjected an entity requesting a  
14 master account to any scrutiny or risk  
15 assessment?

16 A No.

17 Q Okay. What was happening before 2015?

18 A The public record as we have it based  
19 on comments around the time of the creation of  
20 the master account, 1998, makes clear that there  
21 was some kind of process that occurred, but in  
22 the -- and I don't have the exact words, but I'll